

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

GARRY W. CROSS

Claimant

v.

EUSTON ALLEN

& ASSOCIATES, INC.

Respondent

and

STATE FARM FIRE

& CASUALTY COMPANY

Insurance Carrier

Docket No. 1,074,255

ORDER

Respondent and its insurance carrier (respondent), by P. Kelly Donley, requests review of the April 25, 2016, Award by Administrative Law Judge Steven M. Roth. Daniel L. Smith appeared for the claimant.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the Award's stipulations. At oral argument held on August 4, 2016, claimant indicated he was not pursuing a K.S.A. 44-512b interest penalty. Respondent acknowledged claimant is entitled to a work disability award of \$130,000 less prior payments, but not a \$155,000 permanent total disability (PTD) award. The parties agreed a split of the two impairment ratings in evidence should be 24.5%, not the 23% figure listed in the Award.

ISSUES

The ALJ found claimant had a 23% functional impairment, a 100% work disability and was permanently and totally disabled.

Respondent requests the Board adopt the 15% rating of the court-appointed independent medical examiner and such physician's opinion that claimant can work within sedentary-light duty restrictions. Respondent contends the evidence fails to support claimant's hired medical expert's opinions and asserts claimant is not permanently and totally disabled because he is capable of engaging in substantial and gainful employment. Respondent requests the Board award claimant a 62.3% work disability. Claimant requests the Board affirm the Award in all respects.

The sole issue is: what is the nature and extent of claimant's disability?

FINDINGS OF FACT

Claimant, currently 55 years old, lives in Clinton, Arkansas, a town of approximately 2,500 residents. Claimant began working for respondent around 2008 or 2009. His job title was traveling sales support and installations, which required he travel close to 70,000 miles per year. Among his various job duties, claimant inspected windows to ascertain warranty coverage for respondent's Croft Windows account. He also built window and door displays in Sutherlands and smaller retail stores.

Claimant also performed warranty work. Claimant hauled basic hand tools to remove trim, cut the glass out, clean it out, install new glass with sealer and reinstall the trim. Claimant used basic tools, cordless drills, and cordless saws.

Claimant lifted up to 100 pounds while working for respondent. He lifted racks, product, large pieces of glass or large picture windows which weigh around 95 pounds. Claimant climbed ladders and on top of roofs. He climbed out windows to cut them loose from frames. Claimant worked on extension ladders and commonly built scaffolding.

On Sunday, March 24, 2013, claimant was traveling in Kansas to a new Sutherlands store to set up displays. Late in the evening, when it was sleeting and snowing, claimant needed to use the restroom and stopped at a rest stop near Beaumont. The blacktop did not seem to be icy, but as claimant was walking to a restroom, he slipped and badly twisted his right ankle. He landed on the pavement and hit his back and the back of his head. Claimant's right ankle, back, right hip and head hurt.

Claimant drove to his work destination, but with difficulty and pain. He worked for almost three days, but with pain in his right ankle and back. Upon returning home, claimant was evaluated by his primary doctor, who ordered an MRI and sent him to Jonathon Wyatt, M.D., an orthopedic physician. Dr. Wyatt sent claimant to physical therapy, gave him an ankle brace and provided a cortisone injection.

Dr. Wyatt performed an arthroscopy with removal of loose bodies on claimant's ankle in February 2014. Claimant's ankle remained unstable and Dr. Wyatt wanted to send claimant to a Dr. Winn, but respondent sent him to Jason Stewart, M.D., in May 2014.

Dr. Stewart gave claimant a second ankle brace, a double upright brace. The additional brace was heavier and caused claimant to have more back pain. Dr. Stewart released claimant from treatment in August 2014.

Claimant graduated from high school in 1979 without additional formal schooling. After high school, claimant worked construction and in oil fields, drove a truck across the country, worked for a vinyl siding and window warehouse company and, prior to his job for respondent, did similar work for a different employer. Claimant does not have clerical, typing or computer skills.

Currently, claimant has right ankle and low back pain for which he regularly takes hydrocodone prescribed by his primary care physician. Claimant walks with a limp, which increases his low back pain. He walks with a staff and can walk about 100 yards before needing to sit. Claimant testified his ankle rolls and gives way every day and he falls and hits the floor at least once every two weeks. His ankle gives way when he is not wearing both braces.

Claimant testified there are no jobs he can perform in his community. There is only a Walmart and some fast food restaurants and convenience stores. Claimant testified he cannot perform a fast food job because he cannot stand and he cannot work at a convenience store because he cannot stock merchandise or stand at a cash register.

Driving a car is very challenging for claimant. Claimant can drive very briefly to the local store a mile or two from home, but no further. Claimant operates the car using cruise control and his left foot on the brake. For longer trips, claimant has other people drive. Travel causes claimant to have right ankle and low back pain from sitting and riding.

Claimant has not worked since his injury and is not looking for work. Respondent hired someone else to do his job. Claimant testified he cannot return to the work he did for respondent. Claimant applied for and is receiving Social Security disability benefits.

Two medical experts, Daniel D. Zimmerman, M.D., and Peter Bieri, M.D., testified.

Dr. Zimmerman evaluated claimant on June 11, 2015, at the request of claimant's counsel. Dr. Zimmerman testified claimant reported instability of his right ankle and falling despite wearing two external braces and almost always using a staff to walk. Dr. Zimmerman indicated claimant had a very unstable ankle and significant lumbosacral spine pathology, but was not a surgical candidate. The doctor noted claimant had chronic lumbar paraspinous myofascitis due to his fall and his gait derangement, as well as sciatic notch pain. Dr. Zimmerman found claimant had significant right toe and ankle weakness, along with restricted ankle motion.

Dr. Zimmerman testified claimant's fall was the prevailing factor for the residuals of his ankle injury, including arthritic changes of his right ankle, and injury to the L4 disc. The doctor's report stated the accident was the prevailing factor in the collapse of claimant's L1-2 disc, while he testified he did not know if the accident was the prevailing factor in such collapse. Dr. Zimmerman testified due to the permanent residuals of ankle joint instability and osteoarthritic change, claimant has a 30% whole body functional impairment, and a 5% whole body functional impairment due to his lumbar injury. Dr. Zimmerman used Table 36 on page 76 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.) (hereinafter "*Guides*"), to provide the 30% rating and Table 72 on page 110 as a basis for the 5% rating. Table 36 requires routine use of a cane or crutch and short leg brace ankle-foot orthosis. The two ratings combined to be 34% to the body as a whole.

Dr. Zimmerman restricted claimant to lifting 10 pounds occasionally and five pounds frequently; avoid frequent flexing of the lumbosacral spine and right foot and ankle; avoid frequent bending, stooping, squatting, crawling, kneeling, and twisting activities; walk short distances, approximately 100 yards, when using a walking staff and braces; and avoid standing more than five minutes.

Dr. Zimmerman testified claimant will require replacement of his ankle bracing and treatment with nonsteroidal anti-inflammatory medication, and possibly lumbar trigger-point injections, steroid injections or caudal blocks. Claimant is a candidate for future surgical fusion of his ankle.

Dr. Zimmerman reviewed a list of claimant's job tasks prepared by a vocational consultant, Michael Dreiling, and found claimant had a 75% task loss. Nevertheless, Dr. Zimmerman opined claimant is essentially and realistically unemployable as a result of his accidental injury and he cannot even perform sedentary work. According to Dr. Zimmerman, claimant's fall is the prevailing factor causing him to be essentially and realistically unemployable.

Dr. Bieri, a board-certified disability evaluator, performed a court-ordered evaluation of claimant. Claimant told Dr. Bieri he had pain and swelling of his right lower extremity, a gait abnormality, reliance on an assistive device and right hip and low back pain. Claimant also told Dr. Bieri he became physically worse after Dr. Stewart released him from treatment.

Dr. Bieri reviewed medical records and performed a physical examination. Dr. Bieri testified claimant was a large man with a grossly antalgic gait. Dr. Bieri testified claimant's mobility was significantly limited and his ability to walk and stand were limited. Dr. Bieri observed claimant's instability and his right leg giving way, which caused him to be at risk for falling. Dr. Bieri indicated claimant's injury caused chronic and moderate swelling around his ankle. The doctor testified that as long as claimant has an antalgic gait and is reliant on an assistive device, he will have increasing problems with his low back with the passage of time.

Dr. Bieri rated claimant at a 15% whole body impairment, which encompassed claimant's low back pain and right lower extremity pain, using Table 36, page 76 of the *Guides*, based on his gait derangement with requirement for an assistive device.

Dr. Bieri gave claimant permanent restrictions of sedentary to light physical demand and testified he agreed with restrictions provided by Drs. Wyatt and Stewart. Dr. Bieri indicated Dr. Zimmerman's restrictions for claimant are appropriate except for the limitation to stand five minutes at a time. Dr. Bieri testified claimant can stand with an assistive device up to an hour. The doctor indicated claimant could work within such restrictions, but noted he was not a vocational analyst.

Dr. Bieri reviewed a task list provided by Steve Benjamin, a vocational rehabilitation consultant, and determined claimant lost the ability to perform 6 out of 10 pre-injury tasks for a 60% task loss. Dr. Bieri noted claimant was taking a prescription narcotic medication and some occupations prohibit work if a person is on a controlled substance. The doctor was not aware of any sedentary work claimant could perform where he lives.

Dr. Bieri noted claimant's accident was the prevailing factor in his injury, need for medical treatment, impairment, permanent restrictions and disability.

Regarding future treatment, Dr. Bieri testified claimant remains under active care relying on assistive devices for ambulation and prescription narcotic pain medication. The possibility of future right ankle fusion was supported in the records, depending on claimant's symptoms and Dr. Bieri believes this is reasonable, appropriate and consistent. Dr. Bieri testified claimant should continue his current treatment, will require periodic ankle brace replacement and needs ongoing medical supervision for his pain medications.

Mr. Benjamin interviewed claimant by phone at respondent's request. Mr. Benjamin reviewed medical reports of Drs. Bieri and Zimmerman, Mr. Dreiling's report and a wage statement.

Using Dr. Bieri's restrictions, Mr. Benjamin testified claimant was capable of substantial and gainful employment and could earn close to entry-level wages, up to \$344.17 per week based on the central Arkansas non-metropolitan area, a seven county area. For available work and potential wages, Mr. Benjamin considered a geographical area within 50-60 miles of where claimant lives. Claimant could work as a customer service representative, an order clerk, a hotel desk clerk and some sales and cashier positions, jobs Mr. Benjamin indicated are available throughout the year. Mr. Benjamin identified nine jobs in the Clinton, Arkansas, labor market for claimant which were available at the time of his report. The jobs are entry-level positions requiring not more than a high school diploma. These positions were actually in Conway, Arkansas, over 30 miles from claimant's residence in Clinton.

Using Dr. Zimmerman's restrictions, Mr. Benjamin opined claimant was not capable of substantial and gainful employment. Mr. Benjamin stated claimant could do some sedentary jobs with Dr. Zimmerman's limitations, but claimant would not be able to get to the work sites. Mr. Benjamin testified because Clinton, Arkansas, is not a major metropolitan area, there may not be public transportation and he would have to rely on his wife or a friend for transportation. There are no cities and towns within 15 miles, so available jobs would be limited.

Mr. Benjamin testified that when using Dr. Bieri's restrictions, claimant has a 64.6% wage loss, but has a 100% wage loss using Dr. Zimmerman's restrictions.

Mr. Benjamin testified claimant's age of 55 and opioid medication use can be barriers for him returning to the labor market. Claimant has merchandising skills, customer service skills and some sales skills, but is not able to lift the merchandise required for stocking and has difficulty with mobility.

Mr. Dreiling evaluated claimant at the request of his counsel. Mr. Dreiling reviewed restrictions from Drs. Zimmerman and Wyatt and saw Dr. Bieri's report. Mr. Dreiling determined claimant had eight tasks in the five year period preceding his accidental injury.

Claimant's past employment, according to Mr. Dreiling, was heavy work. Mr. Dreiling did not think claimant could do all sedentary work because of his limitations. Further, Mr. Dreiling testified that considering claimant's past work, his education and restrictions, it will be "fairly difficult for him to find employment at all."¹ Mr. Dreiling opined claimant is not realistically employable. Claimant has not had any earnings since March 2013. Mr. Dreiling did not believe claimant could be gainfully employed in Clinton, Arkansas. Mr. Dreiling relied on Dr. Zimmerman's restrictions, Dr. Wyatt's restrictions and Dr. Bieri's comments to assess claimant's employability.

Mr. Dreiling testified claimant's age limits his employability and puts him at a disadvantage when competing for entry-level work with younger people. Claimant would also have vocational adjustment issues after doing a certain type of work all his life then trying to start over in a new career.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee incurring personal injury by accident arising out of and in the course of employment.² Claimant must prove the right to an award based on the whole record under a "more probably true than not true" standard.³

K.S.A. 2012 Supp. 44-510c(a)(2) provides:

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Expert evidence shall be required to prove permanent total disability.

¹ Dreiling Depo. at 21.

² K.S.A. 2012 Supp. 44-501b(b).

³ K.S.A. 2012 Supp. 44-501b(c) & K.S.A. 2012 Supp. 44-508(h).

Case law indicates permanent and total disability is a factual determination based on the totality of the circumstances.⁴ A trial court made the following finding in *Wardlow*:

[B]ased on a totality of the circumstances including [Wardlow's] serious and permanent injuries, the findings of Drs. Prostic and Redford, the extremely limited physical chores [Wardlow] can perform, his age, his lack of training, driving and transportation problems, past history of physical labor jobs, being in constant pain, and constantly having to change body positions.⁵

The Kansas Court of Appeals held, “The trial court’s finding that Wardlow is permanently and totally disabled because he is essentially and realistically unemployable is compatible with legislative intent.”⁶ *Wardlow* has been followed in numerous cases.⁷

From July 1, 1993 forward, the Board assumed the de novo review of the district court.⁸ Board review of an administrative law judge’s order is de novo on the record.⁹ “The definition of a de novo hearing is a decision of the matter anew, giving no deference to findings and conclusions previously made.”¹⁰ De novo review, in the context of an administrative hearing, is a review of an existing decision and agency record, with independent findings of fact and conclusions of law.¹¹

“It is the function of the [Board] to decide which testimony is more accurate and/or credible, and to adjust the medical testimony along with the testimony of the claimant and any other testimony which may be relevant to the question of disability.”¹² The Board “is free to consider all of the evidence and decide for itself the percentage of disability.”¹³

⁴ *Lyons v. IBP, Inc.*, 33 Kan. App. 2d 369, 377-78, 102 P.3d 1169 (2004).

⁵ *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 114, 872 P.2d 299 (1993).

⁶ *Id.* at 113.

⁷ *E.g.*, *Huffman v. DeElliotte Co.*, No. 112,759, 2015 WL 3875402 (Kansas Court of Appeals unpublished opinion filed June 12, 2015) and *Blankley v. Russell Stover Candies, Inc.*, No. 110,014, 2014 WL 2590035 (Kansas Court of Appeals unpublished opinion filed May 30, 2014).

⁸ See *Nance v. Harvey Cnty.*, 263 Kan. 542, 550-51, 952 P.2d 411 (1997).

⁹ See *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

¹⁰ *In re Panhandle E. Pipe Line Co.*, 272 Kan. 1211, 39 P.3d 21 (2002); see also *Herrera-Gallegos v. H & H Delivery Serv., Inc.*, 42 Kan. App. 2d 360, 363, 212 P.3d 239 (2009) (“[D]e novo review . . . [gives] no deference to the administrative agency’s factual findings.”).

¹¹ *Frick v. City of Salina*, 289 Kan. 1, 20-21, 23-24, 208 P.3d 739 (2009).

¹² *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 786, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

¹³ *Id.* at 784.

ANALYSIS

Respondent admits claimant is entitled to a maximum work disability award of \$130,000. Therefore, calculations of claimant's functional impairment and work disability percentages are largely irrelevant. This dispute concerns \$25,000 – the difference between respondent's acknowledged minimum liability for permanent partial disability (PPD) benefits and a \$155,000 PTD award.

For the sake of completeness, the Board finds claimant has a 24.5% functional impairment, which represents a split of the impairment ratings provided by the testifying physicians. The Board sees nothing improper with the judge's methodology and the finding that claimant's impairment is fairly based on giving equal consideration to both physicians' ratings. We also conclude claimant has a 67.5% task loss and a 82.3% wage loss for a 74.9% work disability.

The totality of the evidence indicates claimant is permanently and totally disabled. This evidence includes claimant's age of 55, his high school education, lack of training (other than on-the-job training), lack of skills transferrable to sedentary or light work, his history of mainly heavy work, his sedentary or light duty physical restrictions, with difficulty standing and walking for long distances, which resulted in his use of ankle braces and a staff, the small community in which he resides, the lack of available work therein, his inability or difficulty to drive far, and his daily pain requiring narcotics. The judge specifically noted observing claimant's testimony and finding him credible. Because of his injury, claimant is not able to engage in substantial and gainful employment.

While not germane to the appealed issues or our ultimate ruling, as a matter of housekeeping, the Board cautions that K.S.A. 44-519 excludes opinions not supported by a health care provider's testimony. Both parties referred to opinions of non-testifying physicians, Drs. Stewart and Wyatt. Also, the Award endorses as prudent Mr. Dreiling's consideration of Dr. Wyatt's restrictions. A vocational expert is not allowed to base his or her opinion on an opinion from a non-testifying and absent physician.¹⁴

However, the Award's reliance on Mr. Dreiling's tainted opinion is harmless error. The problem was cured because Dr. Bieri's opinions were properly in evidence, unlike those of Dr. Wyatt, and Dr. Bieri essentially testified that he agreed with Dr. Wyatt's restrictions. K.S.A. 44-519 does not prevent a testifying physician from considering medical evidence generated by other absent physicians, so long as the testifying physician expresses his or her own opinion rather than the opinion of the absent physician.¹⁵

¹⁴ See *Roberts v. J. C. Penney Co.*, 263 Kan. 270, 280, 949 P.2d 613 (1997).

¹⁵ *Boeing Military Airplane Co. v. Enloe*, 13 Kan. App. 2d 128, 130-31, 764 P.2d 462 (1988), rev. denied 244 Kan. 736 (1989).

The Board considered all of the evidence in concluding claimant is permanently and totally disabled. The Board did not consider the inadmissible opinions of Drs. Wyatt and Stewart.

CONCLUSIONS

Claimant is permanently and totally disabled as a result of his accidental injury.

AWARD

WHEREFORE, the Board affirms the result of the Award. Claimant is entitled to 71.43 weeks temporary total disability (TTD) compensation at the rate of \$570 per week or \$40,715.10 followed by PTD compensation at the rate of \$570 per week not to exceed \$155,000.

As of August 24, 2016 there would be due and owing to the claimant 71.43 weeks of TTD compensation at the rate of \$570 per week in the sum of \$40,715.10 plus 107 weeks of PTD compensation at the rate of \$570 per week in the sum of \$60,990 for a total due and owing of \$101,705.10, which is ordered paid in one lump sum less amounts previously paid, including respondent's prior payment for PPD benefits in the amount of \$30,654.60. Thereafter, the remaining balance in the amount of \$53,294.90 shall be paid at \$570 per week until fully paid or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of August, 2016.

BOARD MEMBER

BOARD MEMBER

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Honorable Steven M. Roth